IN THE

Supreme Court of the United States

October Term 1966

No. 658

ARMANDO SCHERFFIUS,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

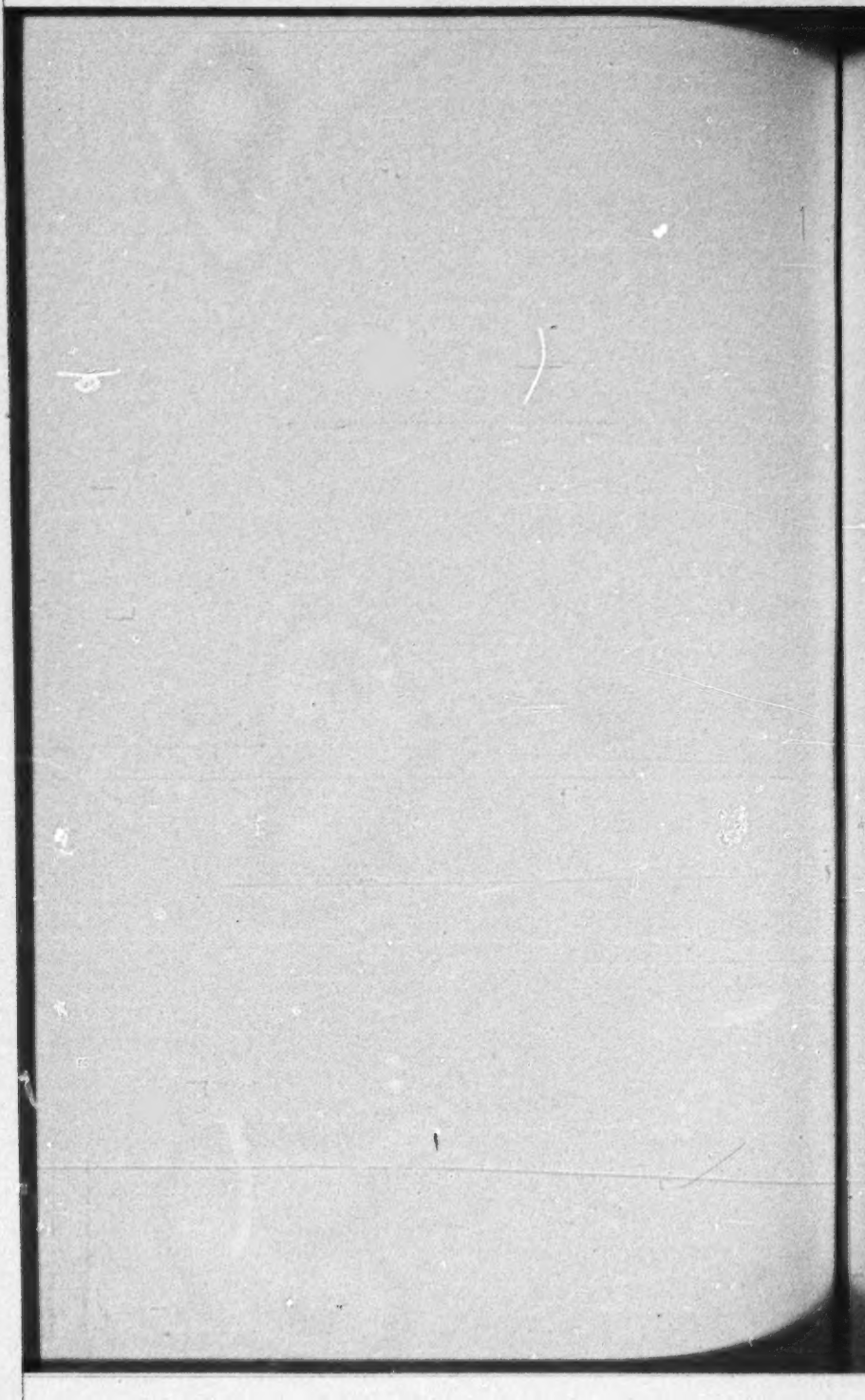
Respondent.

On Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, County of Los Angeles.

BRIEF OF PETITIONER.

THOMAS M. McGUIRE,
315 South Beverly Drive
Suite 208,
Beverly Hills, California,
Attorney for Petitioner.

Ruby & Ruby Inc., Law Printers, Los Angeles. Phone MA. 6-6071.



SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

October Term 1965
No. 658

ARMANDO SCHMERBER,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, County of Los Angeles.

BRIEF OF PETITIONER.

Opinions.

The trial court issued no formal opinion. The Appellate Department of the Superior Court issued no formal opinion but affirmed without opinion.

Jurisdiction.

The judgment of the Superior Court of the County of Los Angeles, State of California was entered on August 24, 1965. A timely petition for rehearing filed on August 27, 1965 was denied on August 30, 1965. [Tr. pp. 163-165.]

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257(3).

Questions Presented.

I.

Does the Taking of a Sample of Blood From a Person Over His Objection Constitute a Violation of Due Process.

II.

Does the Taking of a Sample of Blood From a Person Over His Objection That Counsel Has Advised Him Not to Give Such a Sample Constitute a Denial of the Right to Counsel.

III.

Does the Taking of a Sample of Blood From a Person Over His Objection Constitute an Unlawful Search and Seizure.

IV.

Does the Introduction Into Evidence of a Person's Blood Sample or His Refusal to Take a Blood Test Constitute a Denial of the Privilege Against Self-Incrimination.

Constitutional Provisions Involved.

The Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution provide in part as follows:

FOURTH AMENDMENT

"The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated. . . ."

FIFTH AMENDMENT

". . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty . . . without due process of law . . ."

SIXTH AMENDMENT

"In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

FOURTEENTH AMENDMENT

". . . nor shall any State deprive any person of life, liberty or property, without due process of law. . . ."

Statement of Case.

Petitioner was involved in an automobile accident when the car he was allegedly driving struck a tree. He was observed at the scene by a Los Angeles Police officer as Petitioner was being placed in the ambulance. [Tr. p. 68.] Petitioner received treatment at the hospital for various lacerations. He had a fractured ankle and fractured ribs. [Tr. pp. 149-151.] While in the hospital the Los Angeles Police officer asked Petitioner to agree to a blood sample. The Petitioner initially stated he would give a sample. Previous to the taking of the sample the Petitioner told the officer that he objected and would not give such sample since his attorney had advised him not to give such a sample. [Tr. pp. 87-88.]

Petitioner, in pre-trial proceedings filed a written motion to suppress the evidence of the blood tests and all circumstances surrounding it including the refusal to take the test. The written motion asserted that the taking of the blood was a violation of the Fifth and Fourteenth Amendments to the United States Constitution. The motion was denied. [Tr. p. 32.] The same motion was renewed during the trial and denied. [Tr. pp. 90-94.]

At the trial Petitioner's affidavit supporting his motion for suppression was uncontradicted by the People and contained the statement that a further basis for his refusal was "because of my privilege against self-incrimination contained in the California Constitution and the Fifth and Fourteenth Amendments to the Federal Constitution." [Tr. pp. 20, 30.]

The officer directed the doctor to take the blood sample over Petitioner's objection. Although the officer testified he had arrested Petitioner previous to the request for extracting the blood the City Attorney had stipulated to the correctness of Petitioner's affidavit wherein it alleges that the arrest took place after the blood withdrawal. [Tr. pp. 20, 30, pp. 74-75, pp. 87-90.]

The results of the blood test was introduced in evidence and an expert testified it showed the Petitioner was under the influence of intoxicating liquor. [Tr. pp. 127, 129-130.] Of the four witnesses called by the people who saw petitioner at the scene only the two police officers testified he was intoxicated [Tr. pp. 69-70, 116] one witness testified petitioner was not under the influence and the other testified he thought petitioner was in shock. [Tr. pp. 42, 49.]

ARGUMENT.

I.

Does the Taking of a Sample of Blood From a Person Over His Objection Constitute a Violation of Due Process.

As stated in Chief Justice Warren's dissent in this Court's decision in *Breithaupt v. Abram*, 352 U.S. 432:

> "In reaching its conclusion that in this case, unlike *Rochin*, there is nothing 'brutal' or 'offensive' the Court has not kept separate the component parts of the problem. Essentially there are two: the character of the invasion of the body and the expression of the victim's will; the latter may be manifested by physical resistance. Of course, one may consent to having his blood extracted or his stomach pumped and thereby waive any due process objection. In that limited sense the expression of the will is significant. But where there is no affirmative consent, I cannot see that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest. The Court, however, states that 'the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right.' This implies that a different result might follow if Petitioner had been conscious and had voiced his objection. I reject the distinction.
>
> "Since there clearly was no consent to the blood test, it is the nature of the invasion of the body that should be determinative of the due process

question here presented. The Court's opinion suggests that an invasion is 'brutal' or 'offensive' only if the police use force to overcome a suspect's resistance. By its recital of the facts in *Rochin*—references to a 'considerable struggle' and the fact that the stomach pump was 'forcibly used' —the Court find *Rochin* distinguishable from this case. I cannot accept an analysis that would make physical resistance by a prisoner a prerequisite to the existence of his constitutional rights.

"Apart from the irrelevant factor of physical resistance, the techniques used in this case and in *Rochin* are comparable. In each the operation was performed by a doctor in a hospital. In each there was an extraction of body fluids. Neither operation normally causes any lasting ill effects. The Court denominates a blood test as a scientific method for detecting crime and cites the frequency of such tests in our everyday life. The stomach pump too, is a common and accepted way of making tests and relieving distress. But it does not follow from the fact that a technique is a product of science or is in common, consensual use for other purposes that it can be used to extract evidence from a criminal defendant without his consent. Would the taking of spinal fluid from an unconscious person be condoned because such tests are commonly made and might be used as a scientific aid to law enforcement?

"Only personal reaction to the stomach pump and the blood test can distinguish them. To base the restriction which the Due Process Clause imposes on state criminal procedures upon such reac-

tions is to build on shifting sands. *We should, in my opinion, hold that due process means at least that law enforcement officers in their efforts to obtain evidence from persons suspected of crime must stop short of bruising the body, breaking skin, puncturing tissue or extracting body fluids, whether they contemplate doing it by force or by stealth.*" (Emphasis added.)

This Court now holds that the Fifth Amendment is applicable to the States through the Fourteenth Amendment.

Malloy v. Hogan, 378 U.S. 1, 12 L. Ed. 2d 653, 85 S.Ct. .....

Thus, the argument that the Fifth Amendment doesn't apply to the States, which was one of the arguments asserted by the majority in *Breithaupt*, is no longer a valid support.

Due Process to have a meaning, should unequivocally mean that police may not commit assault and battery on an accused person for the purpose of obtaining evidence to use against him. Why should this Court interpret the Constitution to allow physical evidence obtained as a result of battery (nonconsensual insertion of needle through skin) and theft (nonconsensual taking of personal property—blood) to be used against a defendant when it has held that obtaining oral incriminatory utterances by such means is violative of due process?

Brown v. Mississippi, 297 U.S. 278.

To attempt to draw such a distinction makes a mockery of the Constitution. It seems unreasonable to say that if you place a man on the rack and squeeze an oral

utterance from his lips this is violative of due process, but if you "squeezed" blood out of him, in a medically approved manner, this is not oral and therefore not constituting a confession it is not violative of due process.

Under the present status of the law in California, and in many States, *Breithaupt* is the support for the police to invade person's bodies and extract what evidence they need to help them convict the accused.

People v. Duroncelay, 48 Cal. 2d 766;
State v. Berg, 76 Ariz. 96, 259 P. 2d 261;
State v. Cram, 176 Ore. 577, 160 P. 2d 283.

A decision by this Court is essential to clearly define and limit the claimed right of the police to invade the bodies of citizens and extract from them blood which in no way is contraband. Even the trial judge intimated that a different rule should apply but he felt bound by *Duroncelay supra.* [Tr. pp. 30-31, 94.]

It seems unreasonable to say that only if the accused commits a crime[1] by physically resisting the withdrawal of blood does due process and *Rochin* apply. To follow this reasoning in effect would encourage commission of crimes by an accused in order to protect his constitutional rights. Such reasoning and result would be an anomaly. There is no basis in our society for any reasoning that a citizen must physically fight the police in order to protect his right to due process. By asserting the argument that he must fight the fallacy of the contention becomes obvious.

[1]California Penal Code 148, 242, 243, 834a. These sections provide among other things, that one shall not resist, obstruct, or delay an officer in the discharge of his duties, nor shall one commit a battery on an officer or resist an arrest.

This procedure is also violative of due process since it, in effect, amounts to forcing a person to admit to a crucial part of the People's case. If physical force or other objectionable practices were used to extract an oral or written admission or confession the admission or confession would be inadmissible.

Brown v. Mississippi, 297 U.S. 278;
Ashcroft v. Tennessee, 322 U.S. 143;
Mallory v. United States, 354 U.S. 449.

There is no valid distinction between such judicially condemned practices and the conduct of the police in this case. The result is the same—force is used to extract incriminating evidence from a person.

II.

Does the Taking of a Sample of Blood From a Person Over His Objection That Counsel Has Advised Him Not to Give Such a Sample Constitute a Denial of the Right to Counsel.

A defendant is entitled to an attorney at all stages of the proceedings.

Gideon v. Wainright, 372 U.S. 335 ....;
Escobedo v. Illinois, 378 U.S. 478;
Massiah v. United States, 377 U.S. 201.

When Petitioner advised the police he objected to the blood test because his attorney had advised him not to take it he was certainly exercising his right to counsel. [Tr. pp. 87-88.] How else can a defendant or anyone utilize advice given by counsel except by adhering to the advice given? Here, the conduct of the police in taking Petitioner's blood over his objection and contrary to his counsel's advice, effectively constituted a de-

nial of the right to counsel. This type of conduct by the police if condoned gives the police the right to deny counsel to defendant because the end result is the same —If he doesn't have counsel he takes the test voluntarily—if he has counsel he takes the test involuntarily.

The value of *Escobedo* and *Massiah* are negated if the police can thusly overcome the right to counsel.

III.

Does the Taking of a Sample of Blood From a Person Over His Objection Constitute an Unlawful Search and Seizure.

Petitioner contends that there was an illegal arrest in this matter and that any resultant search was illegal. However, since the trial court held the arrest was legal Petitioner will assume this as true for the purposes of present argument herein. [Tr. pp. 90-94.]

The framers of our Constitution certainly would have been repelled at the thought that someday police officers would claim a right to enter the body of a person, for the purpose of obtaining evidence against him which isn't even contraband, after they have made a lawful arrest. To follow the reasoning that such practice is constitutional, if proper medical means are followed, leads one to the conclusion that exploratory surgery of the abdomen would be proper to prove that a person had narcotics and had swallowed it. This argument and reasoning becomes more frightening when it is realized that the police will be the ones making the decisions. Here, officer Slatterly and officer Smith were the police officers who *ordered* the doctor to extract the blood. [Tr. p. 89.] This was no medical decision but rather a police decision! We should also note that apparently

the doctor was there when petitioner made his objection, but irrespective of this the doctor adhered to the direction of the police. [Tr. pp. 73, 88] This very conduct in this case should be warning enough as to what type of conduct can be expected from the police when no positive limits are set down by this Court.

Certainly logic and reason compels us to conclude that with or without the right to arrest the police do not have the right to puncture the skin of a suspect under claim of right as a reasonable search and seizure. Such a search is not reasonable!

Even assuming a valid arrest and a valid search the state is limited to the proper seizing of contraband or articles used in the perpetration of the crime. Blood does not come within this category.

Boyd v. U.S. 116 U.S. 616, 630;

Gouled v. U.S. 255 U.S. 298.

This court's recent decisions makes Federal standards of search and seizure applicable to the States.

Mapp v. Ohio, 367 U.S. 643;

Ker v. California, 374 U.S. 23.

IV.

Does the Introduction Into Evidence of a Person's Blood Sample or His Refusal to Take a Blood Test Constitute a Denial of the Privilege Against Self-Incrimination.

It seems fallacious to hold, as the California Courts have, that since the taking of blood doesn't amount to testimonial compulsion there can be no violation of the privilege against self-incrimination.

People v. Haeussler, 41 Cal. 2d 252.

Such an argument completely ignores the realities of the situation. Certainly a person is "giving" evidence against himself when blood is being extracted from his veins. What is the difference between forcing a defendant to testify he has consumed sufficient alcoholic beverages to become intoxicated or taking his blood and proving by its content that he has consumed that particular amount of alcoholic beverage? Doesn't the drawing of such a distinction conflict with the underlying rule which holds that oral evidence obtained as a result of an illegal arrest or unlawful search and seizure is excludable as a "fruit" of the official illegality?

Wong Sun v. U.S., 371 U.S. 471.

Certainly it seems that the utilization of blood taken from a defendant over his objection is just as "incriminating" as his statement that he has consumed a specific amount of alcohol. No attempt can be made to make a *valid* distinction between the two processes as regards their constitutional limitations by the privilege against self incrimination.

The court in allowing into evidence the fact of petitioners refusal to take a breathalyzer and blood test further violated petitioners privilege against self incrimination[2] [Tr. p. 96.]

Griffin v. California, 380 U.S. .....

What is the value of the privilege against self incrimination if the assertion of it subjects the individual

[2]In stipulating what part of the lower court's transcript should be reproduced for this brief petitioner failed to have reprinted the courts statement to the jury allowing them to consider the evidence as to the blood sample and the prosecutor's comment to the jury that petitioner refused the breathalyzer test and blood test.

to adverse inferences because of its assertion? If this Court holds that a person has a right to refuse to take a breathalyzer or blood alcohol test then California's rule of allowing evidence of its refusal in evidence is plainly violative of the privilege against self incrimination. California's rule allowing introduction of such evidence is contained in jury instructions prepared and used by the City Attorney of Los Angeles in any driving under the influence case which involves a refusal to take a chemical test. (Appendix A) The word "balloon" is struck out and "breathalyzer" or "blood" is inserted in its place in the appropriate case.

It can thus be seen that such an instruction effectively negates the constitutional right of the person asserting his rights and it amounts to a denial of his rights.

Conclusion.

For the reasons herein stated, Petitioner respectfully urges that *Breithaupt v. Abram,* should be overruled and the judgment of the court below be reversed.

Dated: March 8th, 1966.

Respectfully submitted,

THOMAS M. MCGURRIN,
Attorney for Petitioner.

APPENDIX.

Plaintiff's Proposed Instruction No. .....

YOU ARE INSTRUCTED THAT in a case where a defendant is accused of violating Section 23102 of the Vehicle Code it is permissible to prove that the defendant was offered a balloon test after he or she has been made aware of the nature of the test and its effect. The fact that such test is refused under such circumstances is not sufficient standing alone and by itself to establish the guilt of a defendant but is a fact which, if proven may be considered by you in the light of all other proven facts in deciding the question of guilt or innocence. Whether or not such conduct shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your determination.

Given
Given as Modified
Refused

.....
Judge

People v. McGinnis, 123 Cal. App. 2d Sub. 945

As approved *by People v. Gordon Raymond Starrett* March 20, 1959, CR A 3953